UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

WILDFLOWER COURT, INC.[1]

Employer

and Case 19-RC-14624

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, GENERAL TEAMSTERS UNION LOCAL 959, AFL-CIO

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record[2] in this proceeding, the undersigned makes the following findings and conclusions.[3]

SUMMARY

Petitioner filed the instant petition seeking a unit of all of the Employer's professional employees located at its Juneau, Alaska facility. The petitioned-for unit includes the Employer's eight registered nurses, a physical therapist and an occupational therapist.[4] A second unit of all the Employer's other employees was certified on January 13, 2005.[5] At hearing, the parties stipulated to the appropriateness of a unit of professional employees. However, the Employer raises two contentions in response to the petition. First, the Employer contends that its registered nurses (RNs)

---

1 The Employer's name appears as amended at hearing.

2 The Employer and Petitioner timely filed briefs, which were duly considered. The "entire record" includes the record and the parties' briefs from the hearing in Case 19-RC-14607, which dealt with a petition and issues covering, among other things, registered nurses. Following the end of the hearing in that case, Petitioner amended the petition in that case to exclude the registered nurses and other professionals. I also note that the parties have referred to the record evidence and/or their briefs from Case 19-RC-14607.

3 The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4 The parties stipulated to the professional status of the employees in the Unit.

5 Those employees identified in the nonprofessional unit are the Employer's licensed practical nurses, certified nursing assistants, payroll technicians, accounting technicians, staffing coordinators, health information technicians, ward clerks, social and human services assistants, bath aides, activity aides, restorative aids, laundry aides, maintenance/janitors/home attendants, home attendants, home attendants/janitors, janitors, lead janitors, inventory supply clerks, maintenance mechanics, and lead maintenance mechanics.

should be excluded from the professional unit because they assertedly possess indicia of supervisory authority as that term is defined in Section 2(11) of the Act. Secondly, the Employer contends that in the event I find the RNs are statutory employees, three of the petitioned-for RNs are casual employees who do not perform work on a regular basis or for a sufficient period of time during each week to demonstrate they have a substantial and continuing community of interest with the unit.[6]

Based on the record as a whole and the parties' respective briefs, I find the Employer has established that its RNs are statutory supervisors. Having found the RNs to be statutory supervisors, I need not determine the casual or part-time status of the three RNs at issue.

Below, I have set forth a section dealing with the evidence, as revealed by the record in this matter, relating to (1) the operations at the Employer's facilities, and (2) the statutory supervisory status of the registered nurses. Following the Evidence section is a restatement of the parties' positions, my analysis of the applicable legal standards in this case, conclusion, and my Direction of Election.

I. EVIDENCE

A. The Employer's Operations

The Employer is a State of Alaska non-profit charitable corporation where it operates a 49-bed skilled nursing home located in Juneau, Alaska.[7] The Employer provides long term nursing home services 24 hours a day, seven days a week at its nursing home. The nursing home is contained within a relatively large building organizationally divided into three named "homes." The Employer's administrative offices are located in the same building, which also contains enclosed court yards. Two of the three "homes", "Blueberry Place" and "Cranberry Cottage," are located on one side of the building while the third home, "Huckleberry Lodge," is located on the other side along with the Employer's administrative offices, the latter of which is referred to in the record as Salmon Lane Village.

The Employer has a board of directors consisting of members of the community, but administratively, Millie Duncan, the Chief Executive Officer (CEO) and Administrator, and one of the Employer's witnesses, heads the operations on a day-to-day basis. Reporting to the Administrator is the Director of Nursing Services (DNS) position which is currently vacant. Debe Edens, the former

---

[6] Petitioner, in its brief, requests that I disregard the additions and amendments to Employer Exhibits 18-26 (RN position descriptions (PDs)) in that these exhibits were "initiated and composed in response to the Board proceedings surrounding the supervisory status of the registered nurses and not because the duties of the registered nurses changed." However, the Employer contends that the PDs at issue were updated after the hearing held in 19-RC-14607 because one RN witness testified that she did not see or sign a PD. Based on the record as a whole and for the following reasons, I find insufficient grounds to grant Petitioner's request to disregard Employer Exhibits 18 - 26.

The record reveals that Employer has a practice of providing PDs to new RNs and to have them sign the documents. In the case of the one RN witness who had neither seen nor signed a PD, an Employer witness testified that this RN "apparently was missed" by the Employer due to the HR Director having been on vacation. In the process of curing this oversight by having all its RNs sign new PDs, the Employer also amended the PD to correct references to its former name and to add a reference to Alaska's law concerning the responsibility of RNs.

The addition or amendment to the PD reflects the Employer's previously existing practice, as I find herein, of holding RNs accountable for the performance of others. Thus, the changes to the PDs do not reflect any changes in the Employer's policies. Accordingly, I have considered the new PDs in my findings in this matter.

[7] The non-acute health care nature of the Employer's operation is not at issue.

DNS, left the Employer's employ subsequent to the hearing in the related case 19-RC-14607, in which she was also an Employer witness.[8]

Reporting directly to the DNS position are the departments of Social Services, Medical Records[9] consisting of two Certified Nursing Assistants (CNAs), and Therapy consisting of the two petitioned-for physical and occupational therapists and two rehabilitation CNAs. Two ward clerks and the scheduling coordinator (also CNAs) report directly to the DNS position. The ward clerks' function is primarily office clerical in nature. The scheduling coordinator performs the scheduling for the on-call and CNA employees. It is unclear whether the scheduling coordinator schedules the RNs and licensed practical nurses (LPNs). Also reporting directly to the DNS position is medical records with one CNA and one RN who is not presently working in an RN capacity. The record does not further elaborate on this RN's duties.

Also reporting to the DNS position are the Employer's two Resident Care Coordinators (RCCs), Ann Breidinger and Bill Crompton, both of whom are RNs, as is the Administrator.[10] Breidinger supervises the nursing team, known as the Mountain Side team, whose members are assigned to Blueberry Place and one-half of Cranberry Cottage. Crompton supervises a team, known as the Water Side team, which is comprised of the nursing staff for the remaining one and one-half homes. In addition to supervising the two teams, both RCCs also perform admittance duties, resident evaluations, and compose the resident care plans used by the nursing staff in providing nursing care to the residents. Since the departure of Edens, the RCCs and the Administrator, in addition to their respective duties, share the duties of the DNS.

Five of the petitioned-for nurses and about 33 CNAs are divided into the two teams headed by the RCCs.[11] Of the part-time/"on call" RNs, Susan Abad regularly works the Wednesday night shift and occasionally on other days. Tessie Barill and Ann Akstin work on an on-call basis. In all, the Employer employs approximately 100 employees. At issue in this case are the Employer's eight registered nurses.

B. The Employer's Nursing Operations

The RNs, also referred to by the Employer as Charge Nurses (CNs), are licensed by the State of Alaska and provide long term care for people with injuries or chronic illnesses. In providing this care, the RNs rely on the resident care plans composed by the RCCs. The patient care plans list such care as drawing up blood work, starting feeding tubes and IVs, handling blood transfusions, and thoroughly spelling out in detail the specific tasks for the daily care to be provided to the residents by CNAs. RNs also ensure doctors are called and the RCCs are informed about any other changes to a resident's medical care plan. The plans are reviewed quarterly in meetings attended

---

[8] Martha Ecklund, Executive Secretary, and Ruth Johnson, Chief Financial Officer (CFO), report directly to the CEO. Also reporting directly to the CEO are the Directors of Support Services, Rich Young; Human Resources, Kyla Allred; and Activities/Community Relations, Val Cummins. Along with HR Director Allred's HR assistant, Andrew Ritzman, the parties stipulate to the above individuals as either statutory supervisors or managerial employees who should be excluded from the Act. Based on this stipulation and the record as a whole, I shall exclude these individuals from the unit.

[9] Two witnesses testified somewhat inconsistently regarding the employee make-up of Medical Records. In particular, one witness testified two CNAs work in Medical Records while another witness testified one CNA and one licensed RN work there. The record indicates that the RN does not perform RN functions in Medical Records.

[10] The parties stipulate to the 2(11) supervisory status of the two RCCs. Both RCCs, who testified at the hearing, report to the DNS position when it is occupied. Based on the above and the record as a whole, I shall exclude the RCC and DNS positions from the unit.

[11] The RNs in Breidinger's team consist of Adrienne Gordon and Teresa Cummins. The RNs in Crompton's team consist of Teri Mitchell, Tracy Sulter and Deb Koelsch.

by the nursing department, which is represented by the RCCs, and by other departments such as therapy and social services.

The Administrator and the two RCCs work Monday to Friday, 8:00 a.m. to 4:30 p.m. At precisely 5:00 p.m. the doors to the administrative offices are automatically locked. However, the RNs, LPNs and CNAs working in Nursing Services work a different schedule. One of the first changes Eden incorporated as a new DNS was to change the work schedule of the nurses and CNAs to a two shift schedule consisting of two 12-hour shifts starting from 6:30 a.m. to 7:00 p.m. and from 6:30 p.m. to 7:00 a.m. From Monday through Wednesday and on Friday of each week, the morning shift includes one RN acting as a CN, two LPNs acting as medication nurses, two CNAs for each of two homes and three CNAs for the third home. On Thursday, the morning shift includes one LPN and two RNs; one RN acts as a CN and the other acts as a medication nurse. The night shift works Monday to Sunday with one RN, one LPN and six or seven CNAs. Although State law regards the night shift RN as the CN, the duties of the night shift RN and LPN are shared equally inasmuch as each acts as the CN for the homes identified with their respective "teams."

In sum, two RNs, four LPNs and twelve CNAs are part of the Mountain Side team. Three RNs, three LPNs and 17 CNAs are part of the Water Side team. The Employer also employs what appears to be specialized CNAs who work in the homes. Two of these CNAs do nothing but provide baths for the residents, one for each team, and the other two CNAs provide games and other activities for the residents.[12] Two CNAs not part of the teams are dedicated to restorative functions and assist the physical therapy department in keeping residents turned and moved. One CNA works in medical records. The Employer also employs on-call employees, including seven to ten more CNAs.

The Employer pays its RNs starting between $21.55 and $23.64 an hour depending on experience. Although the RNs are paid hourly, the regularly scheduled full-time RNs actually work 36 hours a week, but are paid for 40 hours a week; the extra 4 hours are deemed a bonus. Susan Abad, who regularly works the Wednesday night shift, and the two other on-call RNs, Tessie Barill and Ann Akstin, are paid hourly at between $30 and $34 an hour. However, they do not receive the 4 hour bonus the other RNs receive. The on-call RNs also do not receive any benefits.

CNAs' wages range between $14.33 an hour and $15.21 an hour depending on experience. RNs, LPNs and CNAs use the same time clock to punch in and out of work. RNs neither check the time cards for accuracy nor schedule CNAs. When a CNA forgets to punch in or loses his or her timecard, RNs, ward clerks, and the scheduling coordinator may sign a form filled out and signed by the CNA showing the time the CNA actually worked.

The Employer contends that the RNs are statutory supervisors in that they responsibly direct and assign, transfer, call in and assign overtime to CNAs. The Employer also contends RNs possess authority to discipline, terminate, hire or effectively recommend hiring, and evaluate employees.

1. Assign and Responsibly Direct

There is no dispute that RNs are responsible for the health care and treatment of the residents, whether or not they delegate their responsibilities to LPNs or CNAs. While there is no dispute that this responsibility emanates in the first instance from the RNs' State of Alaska (hereinafter "State") licenses and/or certifications, there is a dispute over whether the Employer likewise independently holds the RNs responsible for the health care work RNs delegate to LPNs or CNAs. The record provides evidence (or the lack thereof) for both positions. On the one hand,

[12] Although the activities aides are described by the Employer as reporting to the RCCs, it appears they work in the Employer Activities Department, which has its own director, Val Cummins.

there is no evidence that any RN was disciplined by the Employer for the performance of any of the LPNs or CNAs for which he or she is held responsible by the State or by the Employer. Moreover, the Employer's witness, RN Mitchell, testified that RNs do not attend and are not informed of scheduled management meetings. Mitchell also testified that RNs always attend any Employer conducted meetings with LPNs.

With regard to the RNs' responsibilities, the Employer's position description (PD) states that the "RN CHARGE NURSE" is "to provide and supervise the provision of nursing care to the residents of SACC in accordance with current applicable federal, state, and local standards, guidelines, and regulations" and quotes provisions from the State's regulations. The PD also specifically states that the RNs "supervise the work of other nursing staff members, providing guidance and direction to CNAs." Edens, who testified in the hearing in Case 19-RC-14607, testified there is nothing else in writing which confers any more authority on RNs to direct other employees.

The employee handbook also describes the RNs' supervisory authority. However, the policy on this topic described in the handbook does not reach beyond that required by the State. In any event, it appears from the record that the RN performance appraisals rate the RNs' responsibility for the performance of CNAs, even though those evaluations do not appear to affect the RNs' terms and conditions of employment.[13]

Although the evaluation form shows RNs are evaluated regarding their supervisory abilities, the evaluation fails to specify what supervisory abilities are being evaluated. Furthermore, there is no evidence that RNs are evaluated with respect to LPNs. Indeed, the evidence shows that LPNs hold their own licenses authorizing their dissemination of medication independent of RNs, and, as Mitchell testified, because of LPNs' separate licenses, Mitchell does not believe she has direct supervision over them.[14]

Other secondary indicia of supervisory authority demonstrate that CNAs regard RNs and LPNs as their supervisors because they are taught in their courses for State certification that licensed staff supervise them and the courses have this aspect of supervision as part of the curriculum. Evidence also shows that RNs have the keys to the supply room and if CNAs need any supplies, they must go to the RN to retrieve them.

a. Independent Judgment in Assignments and Responsible Direction

As for RN assignments of CNAs, significantly, the record is not clear regarding who makes the initial assignments of CNAs to individual residents, specific shifts, homes and/or to teams.[15] The record does reflect for instance that RN Cummins, on the night shift, does not make the determination as to how many CNAs to schedule on her shift, or what minimum number of CNAs is required to be scheduled during her shift. CNA schedules are posted at the nurses' stations which

[13] Petitioner's witness, RN Cummins, testified that she does not believe the Employer would "demote" her for the care provided by a CNA. Moreover, the evaluations submitted into the record were completed by the DNS who preceded Edens' appointment to the position. There is no testimony as to the nature and extent to which the previous DNS evaluated RNs' supervision of employees or as to how she interpreted and/or applied "supervision" to the evaluation process.

[14] I note that the State Division of Occupational Licensing (proffered into evidence), Appendix E (concerning delegation of nursing tasks in the assisted living environment) provides: "Some activities which require specialized nursing knowledge, judgment and skill may be delegated by the registered nurse to the [LPN]." Appendix A (scope of LPNs' practice) provides "While directly observed supervision is necessary when a [LPN] undertakes additional responsibilities initially, once the LPN has been determined competent, directly observed supervision may not be necessary."

[15] The record does indicate that the scheduling coordinator schedules the CNAs.

indicate to which home each CNA is assigned for the month. The RNs do not post the CNA schedule. Beyond the evidence supplied by the schedule list, testimony also shows CNAs nevertheless have permanent home assignments and generally provide care to the same residents. Moreover, it appears that CNAs are assigned their schedule during the hiring process, before they meet with the RN on their shift, although, again, the record does not indicate the person or persons responsible for these initial assignments.

Although it appears that RNs do not initially assign CNAs to their shifts or to their regular schedules, RNs have occasion to reassign CNAs during a shift. Breidinger testified that this happens "intermittently" and it is not a "daily occurrence." Breidinger further testified that the reassignments normally occur when a home is short of CNA staff and the RN goes to the ward clerk or the therapy aides (also CNAs) to assign them to one of the three homes if no replacement can be found. Cummins testified that, on the night shift, when the ward clerks and therapy aides are not working and when there is a shortage of CNAs, the CNAs work out coverage between them. RNs may also "swap" a CNA from one home with a CNA from another if the RN determines that the experience level of the CNAs in one home requires the addition of a more experienced CNA. According to Mitchell, when she decides to "swap" CNAs, she takes into account the CNA's length of employment and experience in that home. In response to the Employer's leading questions, she also agreed that she takes into account acuity (to some degree) and the needs of a resident. However, any permanent reassignment must be done by RCCs. In that regard, a RCC permanently reassigned a CNA although the RN on the shift objected to the reassignment being made permanent.

In other such reassignments, Breidinger testified that Cummins assigned a CNA to stay with a resident who was extremely agitated and that the CNA was to stay with the resident while Cummins called the physician for orders on the medication to prescribe for the resident.

The RNs also direct CNAs by completing team worksheets for the beginning of their shifts. These sheets may direct CNAs to change their routine with a particular resident given a change in the resident's well being, e.g., whether they are sick and should not be wakened at the usual time. Mitchell testified, as follows, about the type of directions she would write into the team worksheets:

> outline you need these vitals signs for this person. Because people, every person there does not get their vital signs or weights done everyday, that's not routine, only if there's a concern. And so you would assign that or you would say they're not eating well, I think that they need more fluids, they seem to be dehydrated can you encourage fluids and you might write that on the sheet and talk to them and say could you please offer fluids frequently and let me know, keep a toll of how much fluid you get into them or how much food you get into them. If the previous shift said they had not voided, well then I would write there check void, you know, let me know when they go. And if they haven't gone in the first couple of rounds let me know because I might need to call the doctor. [16]

Mitchell further testified that RNs or LPNs can make "slight deviations" from the care plan in this way, but the deviations must still be within the Employer's guidelines and policies. Crompton testified that RNs would call him about making changes to the care plan. In Crompton's one example, he told the RN not to make the proposed changes the RN desired to make.

---

[16] State regulations restrict what tasks may be delegated to CNAs. Appendix E, *supra*, provides in part: "A nurse may delegate to [CNAs] the repetitive performance of a common task, activity, or procedure which does not require the professional judgment of an RN or LPN and which: (1) frequently recurs in the daily care of a client or group of clients; (2) is performed according to an established sequence of steps; (3) involves little or no modification from one client-care situation to another; (4) may be performed with a predictable outcome; and (5) does not inherently involve ongoing assessments, interpretations, or decision-making which cannot be logically separated from the procedure itself."

During the prior hearing, Edens testified that RNs also exercise their authority to direct CNAs reviewing CNA "charting." "Charting" is the procedure by which records are kept by CNAs on the care they provide to residents and as to "what's happening within the facility." CNAs check off (or initial) their completion of each duty outlined on checklists supplied by RCCs. RNs and RCCs review the CNAs' recording of those medical procedures CNAs performed on residents by reviewing the charts for accuracy. RCCs then submit the charts to the State as legally required.

One concrete example of the RNs' authority to direct employees, proffered by Edens, alleges that in an emergency situation--for example, if a resident stops breathing--the RN on duty has authority over everyone in the facility to respond to the emergency. Specifically, she states that when such an emergency did occur, an unnamed RN told Social Services Director Rich Young to call 911. There was no example of an RN directing an employee during the emergency. Moreover, even though the Employer is connected to the hospital by way of a tunnel, RNs are not to transport the resident to the hospital, but are to make sure 911 is called.

The Employer also contends that the RNs on the night shifts are the highest-ranking employees at the facility. However, Cummins, the night shift RN, testified that Edens posted her home phone and cell numbers in the nursing station for the night shift RNs to contact her if needed. The posting states that "after hours, please call." Also listed are the two RCCs' phone numbers. In the instant hearing, after Edens left as DNS, Mitchell's telephone number has been added to that of the two RCCs'. Breidinger testified that she had been called three weeks ago by an RN, but she does not remember what the call was about. Crompton testified that he received two calls a week on average from RNs and more calls following the end of Edens' employment. He states that those calls did not concern CNAs.

Nurses also have access to phone numbers of replacement employees. In that regard, the Employer maintains a list, located at the ward clerk's desk, of on-call replacements and full-time employees available for replacement duty. The ward clerks and the staffing coordinator call for replacements during the day. When the evening ward clerk's shift is over, at about 8:00 p.m., the RN will make the calls if replacement needs arise. There is no contention that RNs, in making these calls, can require anyone to come in. However, Edens asserted that during a busy shift change, RNs have the authority to require employees to stay past their shift for a few hours until the home quiets down. There is no other evidence in the record detailing the use of such authority by the RNs or that RNs have been told they possess such authority. To the contrary, Cummins testified that she cannot assign or authorize overtime and she has never done so. In speaking about overtime, Mitchell testified that, when Edens worked for the Employer, her approval was necessary for overtime. However, since Edens left, overtime approval is acceptable only if there are no other CNAs available who would not accrue overtime pay. Regardless, Mitchell testified that she does not have authority to require any CNA to stay beyond his or her shift. She also testified that she has no discretion in whether to replace an absent CNA—she must do so because of the minimum staffing requirements.

The Employer asserts that RNs can also allow employees to leave if they are too sick to perform their duties or have completed their duties and there is no further need for their services, e.g., when bath aides have completed all the baths. For some unexplained reason the Employer characterizes this leave as a suspension. Additionally, Mitchell testified that on occasions, she permitted CNAs to leave early, but only if the home is calm and, at the beginning of the day, a CNA requested to leave early to, e.g., drive a relative home from the airport. As for her authority to permit a CNA to leave early for such reasons, Mitchell testified that no one has told her she could not do so. There is no evidence to suggest that management told her she had such authority or that management even knew she allowed CNAs to leave early for such reasons.

2. Discipline and Termination Authority

The Employer contends RNs have authority to issue written warnings, to suspend and to terminate employees. In this regard, the record indicates that RNs are required to report to the DNS, employees who are late to work, do not show up, or arrive to work in inappropriate attire. However, there is no evidence that RNs have ever reported employees for such reasons. The Employer further contends that RNs have the authority to fill out incident or disciplinary forms. Edens testified that she reviews the forms. However, the only example of such a review was her testimony that if the incident involved resident rights or abuse, Edens must act within 24 hours to report the incident to the State, otherwise, she states, the Employer's human resources (HR) handles it. She did not detail how HR would "handle" it. Edens further testified that if the incident involved insubordination, she would determine the appropriate discipline. However, there is nothing in the record to show whether Edens conducted her own investigation of any incident reported to her or whether the RN reports include any recommendation. Moreover, there is no mention of any actual discipline that resulted from such a report. Indeed, Edens testified that since she started her employ with the Employer, there has been no occasion where an RN had to administer formal discipline, and, indeed, no example of a report of this sort was submitted into the record. Mitchell testified that 2 and 1/2 years ago, she merely reported a confrontation between CNAs to the DNS, who handled the matter from there. Mitchell also testified that she had not heard anything more about the incident once she reported it. In short, the record shows that the RNs' only function with regard to CNA disputes is reportorial in nature.

As for the RNs' authority to suspend employees, the Employer contends RNs have the authority to suspend or remove employees from the premises for fighting, intoxication, drug use, or if an employee abused a resident. If intoxication or drug use is suspected, RNs send the suspected employee next door to the hospital for a blood test. Breidinger testified that once an employee is sent home for any of these reasons, the employee is to come to the facility the next day, when HR is in the building and "we meet." No further explanation was proffered on this "meeting." In any event, the only instance in the record of an RN exercising this authority is a vague reference to an RN sending an employee home and a subsequent suspension of the employee by the DNS. However, the record does not reveal the identity of the RN who sent the employee home, the identity of the employee, whether the RN made any recommendation in this regard, and the effect, if any, of a RN recommendation. Additionally, the record does not reveal whether the DNS conducted her own investigation of the incident. The only evidence on the incident itself was that it was an "abuse situation." Edens testified that there have been no suspensions or terminations since she assumed the DNS position.

As for authority to terminate employees, the Employer contends that RNs have authority to dismiss an employee for abusing a resident or another CNA and for using drugs. However, the only example of any such authority communicated to the RNs is that Edens told RNs that they are to immediately dismiss any CNA caught sleeping on the job.[17] Thus, it appears from Edens' testimony that the RNs would have no discretion; that is, if the RN caught a CNA sleeping, the RN had no choice but to dismiss the CNA. Cummins, the only RN to testify about Edens' authorization, testified that it was not her understanding from her conversation with Edens that she, Cummins, would dismiss the offending CNAs. Instead, it was her understanding that Edens wanted her to tell CNAs that immediate dismissal might result from sleeping on the job and that the she, Edens, might make a surprise appearance. In any event, there is no contention that RNs have ever actually exercised this authority.

[17] Edens testified that she sent an e-mail to RNs concerning this authority and called the night RNs and held a meeting with the day RNs to inform them of this authority. However, the Employer did not submit a copy of Edens' e-mail into evidence.

3. Hiring/Effective Recommendation of Hiring

The Employer asserts that RNs possess the authority to hire or effectively recommend such. However, its evidence is sparse. According to Edens, RNs occasionally sit in on interviews with the RCCs, HR and the DNS and that the decision to hire or not is a group decision. She states that the only time this occurred, the hiring committee was in unanimous agreement. Edens named a temporary RN, acting in a CN capacity, and Teri Mitchell as the only RNs who "sat in on one." No further information was proffered by Edens. Mitchell testified that she was asked to attend interviews, but only to describe her RN role to the candidates. She neither asked any questions of the candidates nor was her recommendation given or sought.

Two years ago, the Employer asked Mitchell and a full-time ward clerk to sit in on interviews with the HR director for hiring a part-time ward clerk. The HR director asked Mitchell and the full-time ward clerk what they thought about the individuals interviewed and the HR Director agreed with them about whom to hire. However, it is not clear whether that agreement eventually resulted in the hiring of the agreed upon candidate. Moreover, there was no evidence regarding how many candidates were interviewed; whether the RN and full-time ward clerk sat in on all interviews; what their role was in the interview process (could they question the applicants); what criteria the hiring committee used in making its decision; whether any agreement was coincidental; what occurs when agreement is not reached; whether Mitchell could effectively veto an applicant's hiring; and with whom did the final decision on hiring rest.

4. Evaluations

The Employer contends that RNs are statutory supervisors because they evaluate CNAs. However, Edens admitted that these evaluations are used to inform CNAs of their performance and have no connection to discipline, wage increases, or any other aspect of employment status.

II. POSITIONS OF THE PARTIES

Petitioner has petitioned for a unit of professional employees located at the Employer's long-term care nursing home. The Employer contends that its RNs are statutory supervisors in that they responsibly direct and assign CNAs and are accountable for such. The Employer further contends that its RNs use independent judgment and discretion in assigning and directing, reassigning, calling in and requiring overtime of CNAs. Further, it contends the RNs possess supervisory authority to discipline, terminate, hire and effectively recommend hiring, and evaluate employees. Petitioner contends that the RNs do not possess indicia of supervisory authority as that term is defined in Section 2(11) of the Act.

III. ANALYSIS

Section 2(3) of the Act excludes "any individual employed as a supervisor from the definition of 'employee.'" Section 2(11) of the Act defines "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive, and the "possession of any one of the authorities listed in [that section] places the employee invested with this authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *NLRB v. Kentucky River Community Care Inc*., 121 S.Ct. 1861 (2001). The legislative history of Sec. 2(11) indicates that Congress intended to distinguish between employees who may give minor orders and oversee the work of others, but who are not necessarily perceived as part of management, from those supervisors truly vested with genuine management prerogatives. *George C. Foss Co.*, 270 NLRB 232, 234 (1984). For this reason, the Board takes care not to construe supervisory status too broadly because the employee who is deemed a supervisor loses the protection of the Act. *St. Francis Medical Center-West*, 323 NLRB 1046 (1997). Thus, the burden of proving supervisory status is on the party alleging that such status exists. *Kentucky River*. That means that any lack of evidence in the record is construed against the party asserting supervisory status. *Freeman Decorating Co.,* 330 NLRB 1143 (2000). Moreover, whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established. *Phelps Medical Center*, 295 NLRB 486, 490-91 (1989). Additionally, mere opinions or conclusory statements do not demonstrate supervisory status. *St. Alphonsus Hospital*, 261 NLRB 620 (1982), enfd. 112 LRRM 3168 (9th Cir. 1983); *Chevron U.S.A.*, 309 NLRB 59 (1991).

Furthermore, proof of independent judgment in the assignment or direction of employees entails the submission of concrete evidence showing how such decisions are made. *Harborside Healthcare, Inc.*, 330 NLRB 1334, 1336 (2000); *Crittenton Hospital*, 328 NLRB 879 (1999); *Franklin Home Health Agency*, above.

Here, the Employer contends its RNs are statutory supervisors because they responsibly direct and are accountable for their directions of CNAs. It also contends that its RNs use independent judgment and discretion in assigning and directing, reassigning, calling in and requiring overtime of CNAs. Further, it contends the RNs possess supervisory authority to discipline, terminate, hire and to effectively recommend hiring, and evaluate employees.

A. Assign and Responsibly Direct

The Employer takes the position that its RNs are statutory supervisors in that they responsibly direct employees. In order to "responsibly direct" other employees, an individual must be fully responsible for the work of those employees. In *Franklin Home Health Agency*, 337 NLRB 826 (2002), the Board cited with approval *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 267 (2d Cir. 2000) which held that "[i]n determining whether "direction" in any particular case is responsible, the focus is on whether the alleged supervisor is held fully accountable for the performance and work product of the employees he directs." The court also characterized responsible as "being answerable for the discharge of a duty or obligation." In finding whether RNs are fully accountable, the Board in *Franklin Home* looked to whether the RNs were disciplined and evaluated specifically holding nurses accountable for the performance and work product of employees.[18]

Here, there is no record evidence that the Employer's RNs have been disciplined or are subject to such in connection with their alleged responsibility to direct CNAs or LPNs. However, the evidence shows RNs are evaluated on their supervision of other employees. Although the RNs' evaluations are not specific as to whether they are evaluated on their supervision of LPNs, it is clear from the record that the RNs are evaluated with respect to their responsibility to "supervise" CNAs,

[18] The Board in *Franklin Home* did not specify that the evaluations of the RNs had to have an effect on their terms and conditions of employment.

as indicated by both the PD and evaluation forms applicable to RNs and by their actual direction of the CNAs.

However, even if the RNs responsibly direct CNAs, this is not the end of the analysis. The Employer must also show that such direction is performed with independent judgment.

B. Independent Judgment in Assignments and Direction

The Employer contends that its RNs show the use of independent judgment in their assignments and directions because RNs make sure that CNAs perform their daily duties, that LPNs properly and timely deliver resident medications, and that both properly document delivered care. The Employer also asserts that RNs reassign CNAs and redirect their work to perform work outside of their normal duties.

Section 2(11) explicitly states that the exercise of statutory supervisory authority must not be "of a merely routine or clerical nature, but requires the use of independent judgment." See also *Providence Hospital*, 320 NLRB 717, 729 (1996). After *Kentucky River*, the Board has continued to construe as "routine" the direction of tasks that are repetitive and with which the directed employees are adequately familiar. See *Franklin Home*, supra. In *Northern Montana Health Care,* 324 NLRB 753 (1997), the Board found that LPNs did not use independent judgment because they only directed nurses aides in routine tasks of patient care that recurred daily, such as taking residents' vital signs, and assisting them to the dining room and on short walks. Likewise, in *Evangeline of Natchitoches, Inc.*, 323 NLRB 223 (1997), the Board held that LPNs' direction of nurses aides was routine or technical and did not require independent judgment because of the nature of the tasks and the aides' familiarity with their patients. In *Wilshire at Lakewood*, 343 NLRB No. 23, slip op. at 2 (September 30, 2004), the Board found that a "weekend supervisor" was not a statutory supervisor in performing the RN's duties of checking to see whether employees did their tasks correctly, and could correct employees if they did something incorrectly. There, the Board found evidence that the RN was hired as a "supervisor," had authority to oversee the employees," and had responsibility and authority to "correct them" if employees did something incorrectly," was conclusory, based on scant evidence, and thus insufficient to find supervisory authority.

Here, the RNs' authority to see whether CNAs' and LPNs' correctly perform their tasks is likewise insufficient to establish that its RNs require the level of independent judgment necessary to establish 2(11) supervisory status. And as to any assignments made by the RNs, there is no evidence that RNs participate in the initial assignment process. Moreover, in reassigning a CNA to another home because of a shortage of CNAs in the other home is the type of assignment the Board has found not to demonstrate the level of judgment sufficient to find 2(11) supervisory status. Rather, such reassignment appears to involve nothing more than routine judgment about the deployment of available aides to serve a particular patient population. See, e.g., *Illinois Veterans Home*, 323 NLRB 890 (1997).

The Employer also asserts its RNs possess 2(11) supervisory authority in calling in employees to work and requiring CNAs to stay beyond their shifts if no replacement can be found. However, the record does not support its assertion. Rather, in calling in employees, the RNs cannot require anyone to report to work. Testimony also reveals that RNs do not have the discretion to determine how many CNAs will work on their shifts and that they must replace absent CNAs if the ward clerk and scheduling coordinator—positions stipulated to by the Parties as non-supervisory—are not present to perform those duties. Moreover, the evidence shows that in making their calls, RNs are restricted with regard to whom they may call in that the RNs must use a list of regular and approved on-call employees and go down the list and avoid, when possible, selecting employees working a double shift or who would otherwise accrue overtime. Such limited call-in authority has

not been found to be supervisory. See *Harborside Healthcare*, supra; *Washington Nursing Home*, 321 NLRB 366 (1996); *Green Acres Country Care Center*, 327 NLRB 257 (1998).

As for requiring CNAs to stay after their shift, the evidence shows that RNs do not have this authority. Where RNs may request, but not require, an employee to work overtime, the Board has found such requests to be limited authority and RNs used only routine judgment and not supervisory judgment in making such requests. See *St. Francis Medical Center, West*, 323 NLRB 1046 (1997). In any event, the authority to require overtime limited to only those times tasks are not completed and deadlines are not met does not evidence supervisory authority. See *Print-O-Stat*, 247 NLRB 272 (1980).

However, unlike the employees in the above cases, the RNs here have the discretion to redirect CNAs to perform duties that are not part of the CNAs' daily routine. For instance, the Employer's RNs have directed CNAs away from their regular duties and outside of residents' care plans, when they have directed CNAs to stay with residents on a one-on-one basis. When the RNs have so directed, they used their professional judgment to determine that a resident's condition(s) require such care. In making such a redirection, the RN must determine whether the resident's needs are greater than the care the redirected CNA routinely provides to his/her assigned residents, and if so, how much time the CNA can be spared away from his/her normal duties. Cf. *Beverly Heath and Rehabilitation Services, Inc.*, 335 NLRB 635 (2001). Additionally, the Employer's RNs use independent judgment when determining who will replace a sick CNA. In particular, the RNs do not simply move those with the lightest workload to where the need arises. Rather, the RN must determine the impact of such a move on all concerned. For instance, the RN will take into account the experience needed in the positions affected by the move. Further, RNs write up the daily "team worksheet" wherein they direct changes regarding the care given to each resident by CNAs. Under these circumstances, it is clear that RNs are using independent judgment in exercising their authority to responsibly direct and/or to assign CNAs in their work. See, *Alois Box Co., Inc.*, 326 NLRB 1177 (1998), enfd. 216 F.3d 69 (D.C. Cir. 2000).

In terms of secondary indicia of supervisory authority, I note that the RNs serve as the highest ranking employees at the facility for 75 percent of the time; that RNs are the higher paid employees; the RNs are the only ones with keys to the storage area where supplies are kept; and that CNAs perceive RNs as their supervisors. Moreover, if I were to find the RNs employees under the Act, the resulting ratio of one supervisor for some 50 employees would be unrealistic while the 1:4 ratio resulting from finding RNs to be supervisory is the more realistic number.[19]

While I note this is a close case, based on the above and the record as a whole, I find that the RNs' reassignment and/or responsible redirection of CNAs away from their assigned routines, to constitute the exercise of supervisory authority within the meaning of Section 2(11) of the Act.

C. Discipline and Termination Authority

The Employer contends that RNs possess supervisory authority to discharge employees for sleeping on the job, to remove CNAs in confrontation with each other from the floor and to send them home if the matter cannot be resolved, to suspend, and/or to require employees to submit to testing if they show up to work under the influence of alcohol or drugs.[20] However, the Board has

[19] I note that there are secondary indicia militating against supervisory authority such as RNs do not attend management meetings. However, on balance, I find that the other record evidence of secondary indicia, as noted herein, weighs on the side of supporting the presence of supervisory authority.

[20] The Employer also asserts that the RNs have the authority to suspend and to send home sick employees. The Employer did not explain why sick employees would be disciplined by suspension. In any event, sending a sick employee home not only protects residents from infection, but merely shows the RNs' acquiescence in the obvious need for an employee to go home. In circumstances like these, the Board found

found that sending employees home for testing, for being under the influence, or for other flagrant misconduct, does not evidence supervisory status. See *Wilshire at Lakewood*, 343 NLRB slip op. at 3 fn. 10 and cases cited therein. As for the Employer's contention that RNs have the authority to terminate employees for sleeping on the job, the testimony concerning such authority is in conflict, and, as such, inconclusive of supervisory authority. *Phelps Medical Center*, supra. Assuming, arguendo, the RNs possess the authority to dismiss employees for sleeping on the job, it would appear from Edens' testimony that the RNs have no discretion in carrying out her mandate in this regard -- therefore, such authority, is lacking the use of independent judgment and, thus, does not constitute indicia of supervisory authority. *Green Acres Country Care*, supra.

Concerning the Employer's contention that RNs may issue oral and written warnings for misconduct, the Employer provided no documentation evidencing such authority. In this regard, the record reveals that RNs only complete incident reports surrounding misconduct. Whether such incident reports contain a recommendation of any sort is a mystery as, again, the Employer provided no documentation of such. Moreover, there is no concrete evidence establishing whether such reports effectively result in discipline or whether an investigation, independent of the report, is conducted. Without evidence that the incident report affect an employee's employment status, such evidence is insufficient to establish supervisory authority. See *Wilshire at Lakewood*, supra; *Vector Hospital-Los Angeles*, 328 NLRB 1136 (1999).

In sum, the record evidence reveals that the RNs who testified were unaware of the nature and extent of their alleged authority, which the Employer asserts it has vested in them with regard to discharge, discipline, and the authority to effectively recommend the same. Rather, the RNs testimony in this regard reveals that they were aware of very limited authority in which no independent judgment was necessary or which was nothing more than a reportorial function. In view of the above and the record as a whole, I find that the RNs do not possess the authority to discharge, discipline, or to effectively recommend the same.[21]

D. Hiring/Effective Recommendation of Hiring

The Employer maintains that RNs have hiring authority or authority to effectively recommend hiring. The only examples of hiring in the record emanate from Mitchell's participation in the hiring process. According to Mitchell, she was asked to attend interviews for hiring a new RN and a part-time ward clerk. However, her presence in the RN interview was, according to her, limited to merely describing her nursing duties to candidates. This is not an example of hiring or effectively recommending hiring.

Mitchell's participation in the hiring of a ward clerk occurred some time ago where a full-time ward clerk and she were asked to participate in the interview for a part-time ward clerk. Although she testified that both she and the admitted non-supervisory full-time ward clerk offered their opinions, and the HR director agreed with them, there was no evidence of the weight any responsible official placed on the RN's recommendation. Indeed, there is no evidence as to what

---

RNs did not display the kind of independent judgment necessary to establish supervisory status. *Wilshire at Lakewood*, 343 NLRB slip. op. at 3.

[21] The Employer's reliance on *Progressive Transportation Services, Inc.* 340 NLRB No. 126 (2003); *Attleboro Nursing & Rehabilitation Center*, 176 F.3d 154 (3d Cir. 1999); and *Westwood Health Care Center*, 330 NLRB 935, 938 (2000) is misplaced. In the first two cases, the employers maintained respective progressive disciplinary procedures, which would lead to discipline once initiated. However, the record here does not establish that discipline would result from the RNs' incident reports. In *Westwood Health Care*, the employer informed the individuals at issue in that case, that they had authority to issue all oral and written discipline, including suspensions. Here, the RNs' purported authority to suspend and/or to discharge applies only to suspensions for flagrant misconduct or mandatory discharge for sleeping on the job -- in either instance, independent judgment is not required.

guidelines Mitchell and the others used in making their decision, no evidence regarding what would happen if the hiring team disagreed, and no evidence about whether the deciding manager could reject their recommendation. Moreover, there is no showing that the ward clerk and Mitchell's participation was anything more than determining whether an applicant would be compatible with the nursing "team." In any event, the Employer failed to carry its burden of establishing that the RNs possess authority to hire or to effectively recommend hiring. See *Tree-Free Fiber Co.*, 328 NLRB 389 (1999); *Acme Markets, Inc.*, 328 NLRB 1208, 1213 (1999); and *Children's Farm Home*, supra.

E. Evaluations

The Employer contends its RNs demonstrate supervisory authority in evaluating employees. However, the Employer has failed to establish that these evaluations have any significant impact on employees' terms and conditions of employment. The purpose of the RN evaluations, it appears, is to provide the evaluated employee with a means of improving his or her performance. Contrary to the Employer's contention, Section 2(11) does not include the authority to "evaluate" in its enumeration of supervisory functions. Thus, when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be performing a statutory supervisory function. See *Harborside Healthcare*, above; *Elmhurst Extended Care Facilities*, 329 NLRB 535 (1999); *Willamette Industries, Inc.*, 336 NLRB 743 (2001).

VI. CONCLUSION

In light of the above, the record evidence, and the parties' briefs, I find that the RNs possess supervisory authority as that term is defined in Section 2(11) of the Act. Accordingly, I shall exclude the RNs and shall direct an election in the following appropriate unit (hereinafter "Unit"):

> All regular full-time and part-time professionals, including physical and occupational therapists, employed at the Employer's facility located at 2000 Salmon Creek Lane, Juneau, Alaska; excluding registered nurses and all other employees, managers, guards and supervisors as defined in the Act.

There are two employees in the Unit found appropriate.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the Unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the Unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be

represented for collective bargaining purposes by the International Brotherhood of Teamsters, General Teamsters Union Local 959, AFL-CIO.

A. List of Voters

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the alphabetized full names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. The Region shall, in turn, make the list available to all parties to the election.

In order to be timely filed, such list must be received in the Regional Office, 915 Second Avenue, 29th Floor, Seattle, Washington 98174, **on or before February 3, 2005.** No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission to (206) 220-6305. Since the list is to be made available to all parties to the election, please furnish a total of 4 copies, unless the list is submitted by facsimile, in which case only one copy need be submitted.

B. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

C. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, D.C. by 5 p.m., EST on February 10, 2005**.** The request may **not** be filed by facsimile.

DATED at Seattle, Washington this 27th day of January 2005.

/s/ Catherine M. Roth
Catherine M. Roth, Acting Regional Director
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, WA 98174